UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD SEVENTH REGION

ENERGY SAVINGS SYSTEMS, INC. d/b/a BLUE FLAME HEATING AND COOLING Employer

and

PATRICK G. FIGGINS, An Individual Petitioner

CASE 7-RD-3281

and

LOCAL 7, SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, AFL-CIO Union

APPEARANCES:

<u>Stephen Osborn</u>, of Flint, Michigan, for the Employer. <u>Patrick G. Figgins</u>, of Flint, Michigan, for the Petitioner. <u>Tinamarie Pappas</u>, Attorney, of Ann Arbor, Michigan, for the Union.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, hereinafter referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, ¹ the undersigned finds:

1

¹ The Union submitted a brief which was carefully considered.

- 1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
- 2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
- 3. The labor organization involved claims to represent certain employees of the Employer.
- 4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The Employer, Energy Savings Systems of Michigan, Inc., d/b/a Blue Flame Heating and Cooling, is a licensed mechanical contractor that installs and services heating and air conditioning systems. In the last three years, all of its jobs have been performed in single-family dwellings or business establishments requiring individual mechanical units of 20 tons or less. This work is classified as residential and light commercial, respectively. The most recent certification of representative dated April 15, 1998, imparted exclusive representative status to Local 7, Sheet Metal Workers International Association, AFL-CIO (hereafter Union), with respect to a unit of all full-time and regular part-time employees of the Employer involved in service, maintenance, handling, and installation of sheet metal at and out of the Employer's facility in Flint, Michigan. The Employer's current bargaining unit consists of five workers -- three journeymen, one apprentice, and one utility employee.²

The issues for decision are whether the decertification petition in this case is barred by a contract between the Employer and Union, and if not, whether the unit set forth above is appropriate. The Union urges that the petition is untimely filed and that only a multi-employer unit is appropriate for election purposes.

On May 1, 1998, the Employer joined a multi-employer association called the Northern and Mid Michigan Sheet Metal Employers Group (hereafter Group) and agreed to be bound by contracts negotiated between the Sheet Metal Workers' unions and the Group's designated agent, Bloss Labor Consultants. On June 16, 1998, the Group and the Union herein entered into a collective-bargaining agreement effective by its terms beginning May 1, 1998 until April 30, 2001, covering sheet metal workers within the Union's geographical jurisdiction. This 31-page contract, comprised of 15 articles and 23 addenda, is known as the Building Trades Agreement. Although the document does not explicitly so

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² The length of the parties' bargaining relationship was not adduced.

provide, a witness testified that the Building Trades Agreement applies only to those jobs involving heating and cooling systems in excess of 20 tons. Addendum 19 of the Building Trades Agreement states that a "separately published Residential/Light Commercial Addendum is available to signatories of this Agreement."

On October 23, 1998, the Group and the Union entered into a labor contract entitled "Residential/Light Commercial Addendum to the Standard Form of Union Agreement." This three-page contract, known as the Addendum, explicitly covers sheet metal work classified as residential and light commercial for the period beginning July 1, 1998 until June 30, 2001.

The Employer acknowledges being bound by both the Building Trades Agreement and the Addendum. Why the effective and terminal dates of the two documents vary was not revealed on the record.

About February 24 or 25, 2001, within the 60-90 day window period for the Building Trades Agreement, the Petitioner mailed a handwritten document to the Board's regional office. The document, dated February 20, 2001, stated, "We the undersigned employees of Blue Flame are filing a decertification petition in order to vote Local 7 Sheet Metal Workers out of Blue Flame Heating & Cooling." Employee signatures appeared under the foregoing language. On an unspecified date on or prior to March 1, 2001, the Petitioner received a written reply from the Board's regional office, returning the handwritten document and requesting that the Petitioner re-file the petition on an enclosed pre-printed form. The Petitioner telephoned and then visited the regional office on March 1, after the window period, as discussed below, at which time he completed a standard petition form and filed it along with the original handwritten document dated February 20.

The record contains the standard petition form filed March 1 and a redacted copy of the handwritten February 20 document. The reverse side of the latter bears two regional office time stamps, February 26 and March 1. The February 26 stamp has an "X" drawn through it. No testimony was adduced concerning the time stamps, although it is reasonable to infer from the record that the crossed-out date of February 26 represents the date the regional office received the original request. The record does not include the written regional office reply to the Petitioner.

The Union contends that the filing date of the instant decertification petition is March 1, 2001. Board authority suggests otherwise. In *Duke Power Co.*, 191 NLRB 308, 311 fn. 10 (1971), the date of an employee's informal letter requesting the conduct of a decertification election was deemed the date of filing, rather than the date five days later when the employee, complying with the

Board's request, reiterated his informal request by filing a standard pre-printed petition form. The Board, observing that the original request effectively expressed the employee's desires, held that the mere fact that the original request was not upon the Board's standard form should not impinge upon the request's validity.

Here, the author of the February 20 document characterized the request as a "decertification petition" designed to obtain a "vote." This plain expression of sentiment brings it within the ambit of the Board's *Duke Power* rule. The Union in this case correctly notes the absence of direct evidence as to when the Board's regional office first received the Petitioner's request. The result in *Duke Power*, however, was couched in terms of the "date of the original request" rather than the Board's receipt date. This was consonant with the Board's "postmark" principle, see Board's Rules and Regulations Section 102.111(b), which applies to representation petitions. Further, a petition is regarded as "received" by a regional office even if the mechanical details of filing have not been completed by the affixing of a date and time stamp. *Campbell Soup Co.*, 175 NLRB 452, 453 (1969).

Even if the Board's receipt date were determinative, it can be inferred from the record evidence. The Petitioner's having received a mailed reply from the regional office by March 1 means that the regional office had to have received the original request sometime after February 24, the earliest date that Petitioner mailed his original request, and before March 1, the last date on which the Petitioner would have received the Board's reply. I therefore find that the filing date of the petition in this case is on or after February 24 and before March 1.

Even if the petition was timely filed during the window period for the Building Trades Agreement, the Union contends that the petition is nonetheless barred by the Addendum. It is uncontroverted that the Employer's jobs in the last three years have been classified as residential or light commercial, and that the wage and benefit terms of the Addendum have therefore applied. That the Addendum happens to have governed the Employer's recent work, however, does not mean that the Employer is no longer bound by the Building Trades Agreement. As the Employer's president testified, any future sheet metal work involving units of over 20 tons will trigger wage and benefit terms of the Building Trades Agreement.

Moreover, nothing in the Addendum states or implies that the 3-page Addendum supersedes the entirety of the 31-page Building Trades Agreement. Were the Building Trades Agreement inoperative, the Union would lose numerous important protections embodied in the Building Trades Agreement but not covered by the Addendum, such as subcontracting limitations, a definition of holidays, a grievance procedure, a just-cause discharge provision, a no-strike/no-lockout

clause, automatic renewal language, hiring hall procedures, a savings clause, and benefits including work breaks, mileage allowance, and expense monies. A plain reading of the two documents and a consideration of the testimony in light of industrial realities compel the conclusion that when work of a certain nature is performed, the Building Trades Agreement is not supplanted but rather simply modified by the Addendum in limited and specified ways.³

Having determined that the Employer's obligations are set forth in two contracts, the next task is to decide which terminal date prevails for contract bar purposes. The Union cites *Tri-County Transportation Co.*, 179 NLRB 310 (1969), in which a master agreement and supplement contained different termination dates. The master agreement set forth basic general terms such as union security, discharge, layoff, grievance and arbitration procedures, no-strike/no-lockout, and union visitation. The supplement contained variations in wages, vacations and holidays, hours, and dates of fringe benefit payments. The Board held that the master agreement applied for contract bar purposes. Id. at 311. The relationship between the Building Trades Agreement and Addendum in this case is similar to that between the master agreement and supplement in *Tri-County*. This suggests the primacy of the Building Trades Agreement's expiration date.

Other doctrines suggest the same result. Under the Board's premature extension doctrine, the signing of a new contract or amendment during the term of an original contract will not disturb the applicability of the old contract's window period for contract bar purposes. *The Hertz Corp.*, 265 NLRB 1127, 1128 (1982); *Leonard Wholesale Meats*, 136 NLRB 1000 (1962); *Deluxe Metal Furniture Co.*, 121 NLRB 95, 1001 (1958). There being no evidence of another reason for the discrepant dates, the expiration date of the Addendum must be viewed as an effort to extend the three-year life of the Building Trades Agreement. It is axiomatic that the Board, to accommodate the twin interests of bargaining stability and representational choice, will allow a contract to bar a petition for no longer than three years. *General Cable Corp.*, 139 NLRB 1123 (1962); see *M.C.P. Foods*, 311 NLRB 1159 (1993).

Finally, because the Board's contract bar rules are discretionary, *Suffolk Banana Co.*, 328 NLRB No. 157 (July 29, 1999), the Board interprets them to achieve an equitable result. One concern is that parties be able to ascertain when they may file petitions. Accordingly, the Board does not allow confusion created by inconsistent expiration dates to inure to the benefit of the parties responsible for the confusion. *Bob's Big Boy Family Restaurants*, 259 NLRB 153, 154 (1981),

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³ That employees have not filed grievances in recent years does not prove, as implied by the Union, that the grievance procedure outlined in the Building Trades Agreement has been eliminated, nor does the evidence that the Employer's work force currently has no Union steward, especially in view of the testimony that there was a steward in the past.

enf. denied 693 F.2d 904 (9th Cir. 1982) (court agrees with cited principle but quarrels with Board's allocation of fault). When conflicting documents preclude a petitioner from knowing when to file, the petition is not barred. *Cabrillo Lanes*, 202 NLRB 921, 923 (1973).

Here, as evidenced by his conduct and his completion of item #9 of the petition form, the Petitioner relied upon the expiration date of the Building Trades Agreement in choosing when to file. In fact, as far as the record reveals, the only contractual expiration date known to employees is contained in the Building Trades Agreement. Based on the foregoing principles, I find that the three-year term of the Building Trades Agreement controls for contract bar purposes.

The Building Trades Agreement began May 1, 1998 and runs *until* April 30, 2001. Its last full day is April 29, 2001. Consequently, the window period for the filing of petitions commenced January 30 and ended February 28, 2001. As explained above, the Petitioner filed his petition sometime on or after February 24 and before March 1, a span that fits within the window period. The Petition was timely, and a question concerning representation has been raised.

The sole remaining issue is the scope of the unit. The Union urges a multiemployer unit finding, but has presented no supporting evidence. It instead invites a reevaluation of existent Board law.

On April 15, 1998, the Board certified the Union as the exclusive collective-bargaining representative of the Employer's work force in a single-employer unit in Case 7-RD-3134. The record does not reveal for how long the parties had bargained on a single-employer basis prior to the 1998 decertification election.

As far as the record demonstrates, the Employer's relationship with the Group and Bloss Labor Consultants came into existence on May 1, 1998, when the Employer signed a letter of understanding. The letter of understanding does not manifest a specific intent to modify the signatories' individual units to a multi-employer one. Nor does either the Building Trades Agreement or the Addendum expressly create a broader unit. In fact, the Building Trades Agreement states, at Article 15 §5, that by signing the agreement, the signatory employer only "may be" a member of a multi-employer bargaining unit. No evidence has been presented that the Employer has taken affirmative steps to merge its work force into a wider unit.

As the Union acknowledges, the general rule in the construction industry is that a single-employer unit is presumptively appropriate. *John Deklewa & Sons*, 282 NLRB 1375, 1385 and fn. 42 (1987), enfd. 843 F.2d 770 (3rd Cir. 1988)

(employees of a single employer cannot be precluded from expressing their representational desires simply because their employer joined a multi-employer association). No party has advanced either evidence or argument that a multi-employer unit finding is warranted here on community-of-interest grounds.

I conclude that the petitioned-for single unit is appropriate.

5. Accordingly, I find that the following constitutes an appropriate unit of employees for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees employed by the Employer involved in the service, maintenance, handling, installation, and fabrication of sheet metal at and out of its facility located at 2430 N. Dort Highway, Flint, Michigan; but excluding all office clerical employees, guards and supervisors as defined in the Act.

Those eligible to vote shall vote as set forth in the attached Direction of Election.

Dated at Detroit, Michigan, this 9th day of April, 2001.

(Seal) /s/Theodore C. Niforos

Theodore C. Niforos, Acting Regional Director National Labor Relations Board Seventh Region Patrick V. McNamara Federal Building Room 300 477 Michigan Avenue Detroit, Michigan 48226

440-5033-6020 393-6007-1700 347-4060-5000 347-4040-8384-3300 347-4040-1760-2533

DIRECTION OF ELECTION

An election by secret ballot shall be conducted under the direction and supervision of the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those employees in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military service of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by:

LOCAL 7 SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, AFL-CIO

LIST OF VOTERS⁴

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 2 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. The list must be of sufficient clarity to be clearly legible. The list may be submitted by facsimile transmission, in which case only one copy need be submitted. In order to be timely filed, such list must be received in the **DETROIT REGIONAL OFFICE** on or before **April 16**, **2001.** No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court, 1099 14th Street N.W., Washington D.C. 20570.** This request must be received by the Board in Washington by: **April 23, 2001.**

Section 103.20 of the Board's Rule concerns the posting of election notices. Your attention is directed to the attached copy of that Section.

2

⁴ If the election involves professional and nonprofessional employees, it is requested that separate lists be submitted for each voting group.